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Human Rights Due Diligence

An Exercise of Extraterritorial Jurisdiction?

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In its recently released General Comment (GC) No 24 the Committee on Economic, Social and Cultural Rights (CESCR) makes a crucial point: It establishes that regulation imposing Human Rights Due Diligence (HRDD), although having potential extraterritorial effects and impacts, does not imply the exercise of extraterritorial jurisdiction. But is this really the case? This contribution will verify whether this position is rooted in International Human Rights Law (IHRL) and if it finds echo in doctrinal opinion.

The GC No 24 provides also that ‘[t]he obligation to protect entails a positive duty to adopt a legal framework requiring business entities to exercise HRDD’. In this vain, a critical issue arising from the domestic

regulation imposing HRDD concerns its international effects, since it will shape the behavior of companies abroad, leaving place for discussions about the exercise of extraterritorial jurisdiction.

Determining Extraterritorial Jurisdiction

Under general international law, the lawfulness of extraterritorial jurisdiction has been largely discussed. Equally, scholars have been debating the existence of extraterritorial obligations under IHRL. Despite that less attention has been given to the question under which conditions a state's act can be classified as extraterritorial (at p. 97). Indeed, this question is challenging, given that there is no consensus about the concept of extraterritorial jurisdiction. Under IHRL such question gains special importance, given that extraterritorial jurisdiction enacts not only the possibility of legitimate exercise of jurisdiction, but also the duty to comply with legally binding obligations.

It is necessary to define some clear criteria that can be used to verify if extraterritorial jurisdiction is being exercised. By applying these criteria to the models of HRDD regulation, it would be possible to verify if the existing models effectively exercise extraterritorial jurisdiction, or if they don't.

Under general international law, one criterion to identify extraterritorial prescriptive jurisdiction is to distinguish between direct and indirect extraterritoriality. An act that is classified as indirectly extraterritorial regulates a conduct which takes place inside the state's territory and has mere indirect effects abroad. The typical example is a restriction to enter the country, addressed to persons or products – in such cases, the conduct which is regulated occurs within the territory (the entry into the country), despite the undeniable effects abroad. On the other hand, an act should be classified as directly extraterritorial, and consequentially, as exercising extraterritorial jurisdiction, when it directly regulates a conduct abroad. Simply put, the domestic regulation provides a legal consequence for the conduct wherever it occurs, including outside the state's borders. Moreover, concerning prescriptive jurisdiction, the classification of an act as extraterritorial is an interpretative question, and requires an individual analysis of each act or regulation.

Evaluation of General Comment No 24

The elucidation in the GC No 24 regarding the regulation of human rights due diligence and extraterritorial exercise of jurisdiction is very welcomed. Nonetheless, a more detailed elaboration on the subject would be very useful. As it was seen above, the question of extraterritorial exercise of jurisdiction remains controversial and one important source of this controversy is the absence of consensus between scholars over a clear criterion permitting the classification of States' acts as exercising extraterritorial jurisdiction or not.

Accordingly, a better method could have been developed to identify the limits between territorial and extraterritorial jurisdiction in the light of the reasoning presented in the report of the Special Representative on Business and Human Rights Professor Ruggie in 2010. The construction of a clear method would be in the interest of States that would have a better understanding of the extension of their obligations and it would help to trace the limits of non-interference. It would also be in the interest of civil society, since it would help to clarify obligations under IHRL, thus allowing them to pressure the States to comply with international engagements. For business, as it has already been said, the clarification of the issue will certainly contribute to legal security, and thus it would also be in the interest of corporations.

It is indeed regrettable that the GC No 24 did not explore this relation in order to shed more light and guidance to states regarding this issue – especially on the possible links between HRDD, parent company or group liability and potential exercise of extraterritorial jurisdiction.

HRDD and a Treaty on Business and Human Rights

The open-ended Intergovernmental Working Group established by the Human Rights Council in June 2014 is currently working on the negotiation of a legally binding international instrument on Business and Human Rights. As a work in progress, the negotiators should bear in mind that in the present globalized economic context the only possible exercise of sovereignty is sharing sovereignty. In this context, extraterritoriality should be regarded as a tool of cooperation among States rather than a source of conflict of interests and sovereignty friction. More than that, it should not be seen as a simple binary concept. In this context, the clarification of concepts and criteria concerning the exercise of extraterritorial jurisdiction is a key point and it deserves more attention from the doctrine and from the Working Group. A new treaty on the subject of Human Rights and

Business should carefully consider this question.

All considered, human rights due diligence plays a central role in the promotion of human rights and it should be incorporated in a new treaty. It is important to bear in mind that even if human rights due diligence is imposed according to a model of regulation that does not exercise extraterritorial jurisdiction, it will have extraterritorial effects, and it will indirectly influence the behavior of companies abroad. Hence, it is important to take steps towards a multilateral treaty that harmonizes unilateral measures, building an acceptable balance between state sovereignty and business' interests, and, the most important, promoting and assuring the respect, protection and fulfillment of human rights.

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